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In The
Supreme Court Of The United States

OCTOBER TERM, 1982

No._____

RALPH POMPANO
Petitioner

v.

MICHAEL SCHIAVONE & SONS INC., and REVISED PENSION PLAN OF MICHAEL SCHIAVONE & SONS INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 8, 1982

QUESTIONS PRESENTED

1. Whether Congress Intended To Protect Pensioner's Right to Select the Manner of His Pension Payments Under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1022(a)?

2. Whether Congress Required Employers Fully and Accurately to Disclose Restrictions on Pension Benefits Under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1022(b)?

3. Whether A Retired Pensioner Had a Right to A Hearing and A Written Statement of Reasons for the Denial of His Lump Sum Pension Payment Under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1133?

4. Whether A Retired Pensioner Had A Right to Challenge Procedural Irregularities of the Pension Committee Under the Employment Retirement Security Act of 1974, 29 U.S.C. §1132(a)?

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No._____

RALPH POMPANO
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v.

MICHAEL SCHIAVONE & SONS INC., and REVISED PENSION PLAN OF MICHAEL SCHIAVONE & SONS INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Ralph Pompano respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 4, 1982.

OPINION BELOW

The opinion of the Court of Appeals, reported at 680 F.2d 911, appears in the Appendix beginning at page 1A. The denial of petitioner's timely petition for rehearing with a suggestion for rehearing *in banc* appears in the Appendix beginning at page 19A. The opinion of the United States District Court for the District of Connecticut, Burns, J., appears in the Appendix beginning at page 20A.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 4, 1982. A timely petition for rehearing with a suggestion for rehearing *in banc* was denied on July 14, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

Ralph Pompano worked continuously for Michael Schiavone & Sons Inc. from 1935 until January 1, 1976, when he retired. App. p. 21A. As a retired company employee Mr. Pompano was entitled to certain pension payments from the Revised Pension Plan of Michael Schiavone and Sons, Inc., dated March 1, 1972. *Id.*

The Schiavone plan summary disclosed the availability of a lump sum pension payment to all retirees subject to the pension committee's approval. App. p. 13A. In truth, however, under an "unwritten general rule" long-term employees were ineligible for the lump sum payment. *Id.* This ineligibility appears nowhere in the plan summary. App. pp. 13A, 14A.

The lump sum pension payment was a one-time cash payment equal to the present value of the other pension plan options. App. p. 22A. Petitioner intended to invest the one-time payment to provide more income than he would receive in monthly payments under the pension plan. App. p. 23A.

This dispute arose after the respondents orally denied Mr. Pompano's request based on the undisclosed "unwritten general rule." App. pp. 3A, 15A. The pension committee gave no written statement of the reasons for the denial, App. p. 15A; nor were notes kept of the Pension Committee's meeting on the request. App. pp. 15A-18A. The pension committee did not appoint a secretary to keep any records; nor did the committee establish any procedure to review its decision short of litigation. App. p. 17A.

Mr. Pompano initiated this action in the United States District Court for the District of Connecticut, claiming violations of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA") 29 U.S.C. §1001 *et seq.* Federal jurisdiction is provided by 29 U.S.C. §1132(e)(1).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING CONGRESSIONALLY MANDATED DISCLOSURE STATUTES SUCH AS TITLE 29 U.S.C. §1022.

Section 1022(a) of Title 29 requires that a pension plan summary be

> "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."

Section 1022(b) requires a plan summary to describe all the

> "circumstances which may result in disqualification, ineligibility, or denial of benefits . . ."[1]

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[1]The full scope of the Congressional disclosure policy is further expressed in the regulations. Regulation §2520.102-2(b) provides in part that

> "the summary plan description must not have the effect to [sic] misleading, misinforming or failing to inform participants and beneficiaries. [Any] exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized . . ." 29 C.F.R. §2520.102-2(b). See also 29 C.F.R. §2520.102-3(t)(1).

The summary must "clearly identify circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or

As explained in Judge Mansfield's dissenting opinion:

> The Schiavone plan summary stated that the lump sum payment option was available to all participants subject to the Committee's approval. In reality, however, under the "unwritten general rule" long-termers and retirees were ineligible for the option. This ineligibility appears nowhere in the plan summary. App. pp. 13A, 14A. 680 F.2d at 918.

The narrow reading given Title 28 U.S.C. Sections 1022(a) and (b) by the majority below

> cannot be squared with other provisions of the Act, regulations promulgated thereunder, and Congress' intent. Section 2(b) of the Act declares that the "policy of this Act" is to require "the disclosure and reporting to participants and beneficiaries of *financial and other information* with respect to the plans," 29 U.S.C. §1001 (emphasis added), and §102(a)(1) of the Act requires the summary to be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. §1022(a). These unqualified statements of a broad disclosure requirement reflect Congress' desire to ensure "that the individual participant *knows exactly where he stands* with respect to the plan." H.R. Rep. No. 93-533, 93d Cong., 1st Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4649 (emphasis added). App. p. 14A. 680 F.2d at 918 (Mansfield, J., dissenting).

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1 (continued)
suspension of any benefits," 29 C.F.R. §2520.102-3(1), which encompasses "claims which are denied in whole or in part." *Id.* at subsection (s). See also *id.* at subsection (t)(2); 29 C.F.R.§2560.503.1 (e)(1).

Congress, in enacting these disclosure requirements for pension plans, acted with considerable experience in other areas of federally-mandated disclosure. For example, Congress' efforts to regulate securities[2] evince a "fundamental purpose ... to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). Such a disclosure statute must be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." *Id.* at 195. See, also, *Touche Ross & Co. v. Securities & Exchange Commission*, 609 F.2d 570, 580 (2nd Cir. 1979). Another federal disclosure law, the "Truth-in-Lending Act (15 U.S.C, §§1601 *et seq)* reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.' " *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 377 (1973). Thus the Act is "designed to protect those with the least intelligence ..." *Grey v. European Health Spas, Inc.*, 428 F.Supp. 841, 846 (D. Conn. 1977) (Newman, J.); and, therefore, "its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated." *N.C. Freed Co., Inc. v. Board of Governors of Federal Reserve System*, 473 F.2d 1210, 1214 (2nd Cir. 1973).

Like other federal disclosure laws, ERISA too must be interpreted to effectuate Congress' insistence that companies and employee benefit plans like respondents "reasonably apprise such participants and beneficiaries

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[2]This Court has enumerated these regulatory statutes as the Securities Act of 1933, 15 U.S.C. §77a; the Securities Exchange Act of 1934, 15 U.S.C. §78a; the Public Utility Holding Company Act of 1935, 15 U.S.C. §79; the Trust Indenture Act of 1939, 15 U.S.C. §77 aaa; and the Investment Company Act of 1940, 15 U.S.C. §80a-1 *et seq. Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 & n. 15, (1972).

of their rights and obligations under the plan."[3] 29 U.S.C. §1022(a)(1). To fulfill Congress' "philosophy of full disclosure," *SEC v. Capital Gains Research Bureau, supra*, and to eliminate the conflict between the Second Circuit's excessively restrictive view of ERISA's disclosure requirements and this Court's view of similar federal statutes, this Court should grant the writ of certiorari to review the judgment below.

2. THE DECISION BELOW RESTRICTED THE PROCEDURAL PROTECTIONS OF 29 U.S.C. §1133 AND NULLIFIED A REGULATION OF THE SECRETARY OF LABOR, 29 C.F.R. §2520.102-3(t)(2).

Title 29 U.S.C. §1133 provides that, where a pension plan has denied a participant's request for benefits, the plan must provide written notice of such denial, including statement of reasons, and for a reasonable opportunity for full and fair review of the decision. Without statutory basis, the majority held that these procedural protections are inapplicable to the denial of a requested mode of payment. As Judge Mansfield stated in dissent:

> The Schiavone plan also violated the procedural protections provided in §503 of the Act, 29 U.S.C. §1133, by failing to give Pompano written notice of his denial and an opportunity for a full and fair review. (footnote omitted) The majority limits §503 to a denial of benefits, and holds that written notice and an opportunity for review are not required for the denial of a requested mode of payment. The rationale for

[3]The Schiavone pension plan summary certainly did not present the availability of the lump-sum option "in a manner that an average and reasonable worker can understand intelligently." H. Report No. 93-533, 1974 U.S. Code Cong. & Admin. News, *supra;* 29 C.F.R. §2520.102-2(a).

such a distinction escapes me, since the regulations mandate §503's procedural safeguards whenever "a claim for a (pension, welfare) benefit is denied in whole *or in part.*" 29 C.F.R. §2520.102-3(t)(2) (emphasis added). The denial of the requested lump sum payment, which clearly reduced the value to Pompano of his pension, certainly constitutes a partial denial of his claim. Moreover, the legislative history of §503 reveals that Congress was concerned with procedures for resolving and reviewing "*disputes* between the plan administrator and participants or beneficiaries," H.R. Rep. No. 93-1280, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad News 5038, 5108 (emphasis added), which would encompass more than the outright denial of all benefits. Finally, §503 must be interpreted in light of ERISA's strong concern with ensuring strict plan compliance with the Act. Accordingly, I would hold that Schiavone violated §503 of the Act. See *Frary v. Shorr Paper Products, Inc.*, 494 F.Supp. 565 (N.D. Ill. 1980), where the court held that the wrongful denial of a participant's request for a lump sum payment of benefits violated "his rights under the terms of the plan" (29 U.S.C. §1132(a)(1)(B) and ordered the lump sum payment be made. App. pp. 15A-17A. 680 F.2d at p. 919.

The decision below removes effective and important Congressionally-mandated procedural protections for pensioners which were designed to eliminate unnecessary suits in the federal courts. Cf. e.g. *Anderson Brothers Ford v. Valencia*, 452 U.S. 205 (1981). In this era of ever increasing burdens on the federal judiciary, Congressional attempts to reduce litigation should not be thwarted.

The need to prevent unnecessary litigation from reaching the federal courts requires the grant of certiorari to review the judgment below.

3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS AS TO THE PROPER INTERPRETATION OF 29 U.S.C. §1132(a).

Despite the admitted failure of the pension plan committee to keep written records of its meetings and decisions, as required by the plan, the majority below held that this violation of the plan's term gave rise to no claim under 29 U.S.C. §1132(a), which authorizes suit by a plan participant to enforce the terms of the plan. The majority below held that such violation must be causally related to a decision to deny benefits in order for the plan participant to enforce the terms of the plan. Such a requirement does not appear in the statute, nor in the decided case law.

Judge Mansfield stated in dissent:

> Finally, I would also hold that Schiavone's failure to maintain written records, expressly required by the terms of the plan, is a violation of the Act that is actionable under §502(a)(3), 29 U.S.C. §1132(a)(3). The majority concedes implicitly that the district court erred in characterizing §502(a)(3) as merely conferring standing by stating, in an attempt to sidestep this clear violation, that "there is no causal relationship between the conceded failure of the Committee to keep written records of their proceedings and the decision it made to deny appellant a lump sum benefit." Maj. Op. p. 8, *supra*. With all due respect, this explanation, offered without any

authority and devoid of any basis in the statute, is unsupportable. As noted earlier, ERISA expressly authorizes compliance suits independent of any claim for benefits, and such suits have been brought, for example, to prevent possible future violations, to challenge various aspects to a new plan, and to object to an amendment to a plan that may affect the future eligibility of unspecified participants. See note 2, *supra.* [citing *Lechner v. National Benefit Fund for Hospital and Health Care Employees,* 512 F.Supp. 1220 (S.D.N.Y. 1981) (suit by non-claimant to prevent possible future violations); *International Ass'n of Bridge, Etc. v. Douglas,* 646 F.2d 1211 (7th Cir. 1981) (suit under 29 U.S.C. §1132(a)(1)(B) challenging plan amendment that *might* affect unspecified future participants); *Corley v. Hecht Co.,* 530 F.Supp. 1155 (D.D.C. 1982) (misleading plan summary violates disclosure requirements of 29 U.S.C. §1022(a)(1); *Janowski v. International Brotherhood of Teamsters Local No. 710,* 500 F.Supp. 21 (N.D. Ill. 1980) (challenging various aspects of new plan)] The majority's holding engrafts onto §502 a requirement that the alleged violation of ERISA must be "causally related" to some denial of benefits. Because this can be done only by disregarding the clear terms of the Act, its legislative history and existing case law, I decline to follow that course. App. p. 17A. 680 F.2d at 919.

In *Landro v. Glendenning Motorways, Inc.,* 625 F.2d 1344, 1356 (8th Cir. 1980),[4] the court explained

"... §1132(g), like the rest of ERISA, is remedial legislation that should be construed liberally in favor of those persons it was meant to

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[4]In *Landro,* the Court enforced the terms of the pension plan.

benefit and protect, namely, participants in and beneficiaries under covered pension and welfare plans; persons, in short, like appellees, who are specifically permitted by §1132(a) and (f) to sue in the federal courts to enforce their rights under their pension plans."

The majority's decision creates a conflict, as to ERISA's interpretation, between the Second Circuit and the Seventh and Eighth Circuits. This conflict justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully Submitted

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 788—August Term, 1981

(Argued March 29, 1982 Decided June 4, 1982)

Docket No. 81-7841

RALPH POMPANO,

Plaintiff-Appellant,

—v.—

MICHAEL SCHIAVONE & SONS, INC. and REVISED PENSION PLAN OF MICHAEL SHIAVONE & SONS, INC.

Defendants-Appellees.

Before:

KAUFMAN, MANSFIELD and CARDAMONE,

Circuit Judges.

Appellant Pompano commenced an action for claimed violations of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* when upon retire-

ment from appellee, Michael Shiavone & Sons, Inc., he was denied pension benefits in a lump sum. He appeals from the judgment which dismissed this action, entered in the United States District Court for the District of Connecticut, Burns, *J.*, following a bench trial.

Affirmed. Judge Mansfield dissents in a separate opinion.

WILLIAM H. CLENDENEN, JR., New Haven, Connecticut (Clendenen & Lesser, New Haven, Connecticut, on the brief), *for Plaintiff-Appellant.*

SHAUN S. SULLIVAN, New Haven, Connecticut (Patrick M. Noonan, Wiggin & Dana, New Haven, Connecticut, on the brief), *for Defendant-Appellees.*

CARDAMONE, *Circuit Judge:*

Appellee Michael Schiavone and Sons, Inc. ("Schiavone") had a pension plan for the benefit of its employees, one of whom was appellant Ralph Pompano. When Pompano reached retirement age (65) after 36 years as an employee of Schiavone, he sought a single lump sum payment which, under Article IV § 2 of the plan, was one of the optional modes of settlement a participant could elect "[i]n lieu of the normal pension to which he would otherwise be entitled." The plan provided

that the lump sum option was available only with the "prior approval of the [Pension] Committee."

When the plan became effective in 1972, all of Schiavone's employees were given a pamphlet which explained its major provisions in simple terms. The pamphlet made clear that the lump sum option was available "only with the permission of the Committee." Pompano's request for a lump sum payment was considered by the Committee ("Committee") and denied. He retired December 31, 1975, was awarded and is presently receiving monthly pension payments of $296.83.

In March 1976 Pompano commenced the instant action against Schiavone and the Revised Pension Plan of Michael Schiavone & Sons, Inc. ("Plan"), for: damages for claimed violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*; release of his pension benefits in a lump sum, and for costs and attorneys fees. A bench trial was had on September 23, 1980 before the United States District Court for the District of Connecticut, Ellen B. Burns, Judge, which resulted in a judgment dated October 23, 1981 in favor of appellee dismissing the action. From that judgment this appeal is taken.

At issue is the Committee's range of discretion in the awarding of pension benefits, the procedures used by the Committee in exercising that discretion and whether Schiavone discriminated against appellant by not inviting him to a dinner for retiring employees.

I

This appeal raises questions the answers to which can be found only after an analysis of ERISA. To construe a statute we look first to the words actually used by the drafters, remembering that words are but signs that point

to ideas. We may also examine the statute's legislative history to ensure that the meaning we have ascribed to these words fits their purpose, as that was what Congress intended. Legislators' expectations in creating laws are best described in Shakespeare's aphorism "I endow'd thy purposes with words that made them known."[1] *See,* Note, *Intent, Clear Statements, and The Common Law: Statutory Interpretation In The Supreme Court,* 95 Harv. L. Rev. 892 (1982).

ERISA provides that a "summary plan description of any employee benefit plan" must be furnished to participants and must be "written in a manner calculated to be understood by the average plan participant, . . . sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1) (1976). The Plan, which made a lump sum payment available only with prior approval of the Committee, was written up in summary form in simple and unmistakable language easy enough for the average plan participant to be reasonably apprised of his rights and obligations under the Plan.

Included in the specific information which the summary of the plan must contain is a description of the "circumstances which may result in disqualification, ineligibility, or denial or loss of *benefits.*" 29 U.S.C. § 1022(b) (1976) (emphasis supplied). As the emphasis illustrates, and as the policy of Congress—"many employees with long years of employment are losing anticipated retirement benefits," 29 U.S.C. § 1001a (1976 & Pub. L. No. 96-364, § 3, 94 Stat. 1208, 1209 (1980))—makes plain, the

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[1] W. Shakespeare, *The Tempest,* Act 1, scene ii, *reprinted in The Complete Works of Shakespeare,* (W. Craig ed. 1928).

focus of concern with circumstances that might cause a participant or beneficiary not to receive benefits. The summary of the Schiavone Plan included all that ERISA requires.

It is appellant's contention, however, that there existed a secret, unwritten rule which he claims violated section 1022(a)(1) because it denied lump sum benefits to long term employees. While it might appear plausible to argue that the summary should have enumerated the factors to be considered by the Committee in making its determinations, such a requirement would defeat the purpose of a summary, i.e., a brief restatement. Such argument would also find little or no support in ERISA or its legislative history.

No specific mode of payment is provided for in ERISA. The policy considerations underlying the statute mandate the setting of standards only as to the fiscal soundness of a plan. 29 U.S.C. § 1001a. To accomplish that objective, standards of conduct, responsibility and obligation are imposed on the fiduciaries who control and manage each plan. They are required to act with the care and diligence of a "prudent man," *id.* at § 1104(a)(1)(B) (1976), and subject themselves to personal liability for a breach of that fiduciary duty, *id.* at § 1109(a) (1976). A reading of the statute's legislative history compels the conclusion that ERISA's purpose is to secure guaranteed pension payments to participants by insuring the honest administration of financially sound plans. *See* H.R. Rep No. 93-1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038-5165. Thus the plan must specify the basis on which payments are to be made to participants and beneficiaries, U.S. Code Cong. & Ad. News at 5078, so as to meet the legislative purpose of having each participant know exactly where he stands

with respect to the plan. *See*, H.R. Rep. No. 93-533, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649. This requirement is not intended, however, to undercut the flexibility essential to effective and responsible financial management of the plan which Congress intended when it adopted for ERISA fiduciaries the "prudent man" standard. U.S. Code Cong. & Ad. News at 5083 (1974).

The trial court found no bad faith or arbitrariness on the part of Schiavone based on its denial of the lump sum payment to Pompano. The Plan's lump sum option was never granted lightly. The evidence showed that the Plan's actuaries had, in 1972, advised the Committee not to make lump sum payments for three reasons: first, Plan assets might have to be sold in order to pay large lump sum amounts; second, free availability would complicate long term investment strategy; and third, such payments invalidate long term mortality assumptions. The Committee had previously granted some lump sum requests, but only where the requesting employee's lump sum payment was less than $3,000. Such did not constitute a drain on the fund and the minimal monthly payments on such a small vested amount would not have met the major purpose of the plan—assurance of a monthly income that one can retire on—and would have been a bookkeeping nuisance. An actuary testified that plaintiff's lump sum option amounted to $38,172,[2] well over the $3,000 preclusion level set by the Committee. Concededly, the actuary testified that he did not know if there would have been any *actual* monetary loss to the Plan, whose assets were then $1,252,000, if the plaintiff had been granted the

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2 Presumably, at current interest rates the monthly income on that amount would be appreciably more than the monthly benefits Pompano now receives.

lump sum amount. The trial court also found that the lump sum option was rarely granted; e.g., there was evidence that a company executive also had his request for a lump sum distribution turned down at approximately the same time as appellant. However, the court found that the Committee did not follow an arbitrary path, but instead listened to advice from its actuaries in formulating this policy.

Appellant's request could be detrimental to the other beneficiaries of the Plan and the Committee owed a fiduciary duty to them (as well as to appellant) to insure a stable retirement fund. 29 U.S.C. §§ 1101-1114 (1976 & Pub. L. No. 96-364, 94 Stat. 1208 (1980)); *see also*, 29 C.F.R. 2550.404a-1 (1981). Such an amount, singly or in combination with other lump sum requests, can reasonably be said to be capable of having an adverse impact on the three factors mentioned in the actuaries' 1972 report and it was a matter entrusted to the Committee in their discretion to grant or deny this request.

We have stated that when a pension committee is acting within the law its discretionary acts should not be disturbed, absent a showing of bad faith or arbitrariness. *Riley v. MEBA Pension Trust*, 570 F.2d 406, 410 (2d Cir. 1977). The appellant is entitled to his benefits and is indeed receiving them but he had no absolute right under the Plan to the specific mode of payment that he requested. The trial court found that the trustees were not acting arbitrarily or in bad faith in denying this pensioner his lump sum request; additionally, there was no bad faith attempt by the trustees to confuse or mislead any Plan participants as to the lump sum distribution option. The plaintiff had notice of the fact that the lump sum option was at the discretion of the Committee and the trial court found such notice reasonably apprised appellant of his

rights under the Plan. These findings are not clearly erroneous.

II

Other errors that appellant claims were made by the Committee involved the failure of the trustees to observe certain procedural requirements of both ERISA and the company Plan, to wit: failure to send appellant a written notice of the denial of his claim (29 U.S.C. § 1133(1) (1976)), failure to give him an opportunity for review (29 U.S.C. § 1133(2) (1976)), failure to keep adequate records (29 U.S.C. § 1059(a)(1) (1976)); and failure to provide for arbitration of the dispute as the Plan requires.

The plaintiff argued that he should have been given notice in writing when the requested lump sum distribution was denied. Title 29 U.S.C. § 1133(1) specifically provides for written notice to a plan participant whose benefit claim is denied. The trial court held, however, that no benefits were denied plaintiff. Rather it was only the requested *mode* of distribution of these benefits that was denied to him; that denial was explained to him orally.

A reading of ERISA, together with its legislative history, supports the finding of inapplicability of § 1133(1) and (2) to this case. There is strong evidence to suggest that the procedural protection set forth in the statute is intended to safeguard the participants substantive rights to receive benefits. The House Conference Report explains that § 1133 was included as a compromise means of requiring procedures for resolving certain disputes between the plan administrator and participants. The House Bill contained no such provision and the Senate bill provided for review and arbitration of any dispute. The final compromise version only covers denial of a "claim for benefits." H. R. Rep. No. 93-1280, 93d Cong.,

2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5108. One of the Senate Managers of the Act, reporting to the Senate on the conference agreement stated that "prior to bringing an *action to recover benefits* from the plan the participant . . . would have the right to receive written notice . . . of the special reasons his claim *for benefits* was denied; and, in addition, would be entitled to full and fair review . . . of the decision to deny *such benefits.*" (emphasis supplied).

Another piece of evidence indicating that the thrust of the statute is the safeguarding of benefits is the establishment of the Pension Benefit Guaranty Corporation whose function it is to insure the timely and uninterrupted payment of benefits. 29 U.S.C. § 1302(a) (2) (1976). It is abundantly clear therefore that the purpose Congress had in mind was to provide safeguards to participants for the payment of their benefits. Neither the Act nor its legislative history comments on the mode or manner in which benefits should be paid. We do not intend to imply that the form which payment of benefits takes may never be such as to constitute a substantive denial of ERISA benefits. Appellant, however, is receiving his rightful due in monthly distributions. The inescapable conclusion is that the denial of the particular method of payment requested in this case did not, on the facts, constitute a denial of a "claim for benefits," and thus did not necessitate written notice and fair review under either § 1133(1) or (2).

Appellant's arguments with respect to arbitration and the failure of the Committee to keep written records are unavailing. The Plan itself expressly excluded from arbitration Committee decisions regarding the mode of benefit payments. As to record keeping there is no causal relationship between the conceded failure of the Commit-

tee to keep written records of their proceedings and the decision it made to deny appellant a lump sum benefit. The decision to deny appellant's request and the reason for it were communicated orally to him by the Committee.

III

The last contention made is that Schiavone discriminated against Pompano by not inviting him to attend a company dinner honoring other retirees. It is unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right" under a pension plan of ERISA. 29 U.S.C. § 1140 (1976). The trial court found that the reason appellant was not invited to the company dinner was not because he had exercised his rights, but because the acrimony which had developed caused the company's officers reasonably to apprehend that if he attended, an unpleasant incident would occur ruining the dinner for those invited.

The trial court further found an absence of discrimination in the fact that although appellant was scheduled to retire on April, 1975 (the date of his 65th birthday), he requested and was twice granted postponements of retirement so that he did not actually leave employment until the end of December. The reason for this was to ameliorate the hard feelings engendered by the decision made on the pension benefits.

In our view it strains credulity to believe that the reach of § 1140 extends so far as to include a failure to invite a participant or beneficiary of a plan under ERISA to an employer sponsored social event. This section is designed to prevent "unscrupulous" employers from discharging or harassing plan participants in order to keep them from

realizing their vested pension rights. *West v. Butler,* 621 F.2d 240, 245 (6th Cir. 1980).

In any event, these findings of fact made by the district court on this claim were not clearly erroneous.

An award of attorneys' fees was not made in the lower court and is not warranted on this appeal.

The judgment is affirmed.

MANSFIELD, *C.J.* (Dissenting):

I respectfully dissent. In my view the Schiavone pension plan violated ERISA in several significant respects, most notable of which is its representation that a single lump sum payment was available to all retirees with Committee approval when in fact Schiavone had a firm undisclosed rule prohibiting such payments to long-term retirees, of whom the plaintiff was one. The Act specifically authorizes a person in plaintiff's position to bring an action for relief against these violations, regardless whether benefits have been denied, as a means of insuring compliance with the Act's full disclosure requirements.

The majority starts out on the erroneous premise that "[a]t issue is the Committee's range of discretion in the awarding of pension benefits [and] the procedures used . . . in exercising that discretion," Maj. Op. p. 2, *supra.* It then proceeds to defend at length the denial of the lump sum payment as an exercise of discretion not based on bad faith or arbitrariness but grounded on sound economic considerations. The issue before us, however, is not the soundness of the Committee's exercise of discretion.[1] Nor is the economic basis or wisdom of a policy

[1] Even if the Committee's exercise of discretion were an issue, there is no evidence that the denial of lump sum benefits to plaintiff in this case involved a particularized determination by the Committee not to grant his request.

against lump sum payments being challenged. The issue is whether the Schiavone plan summary complied with ERISA's express requirement that it be materially accurate. The answer is that the summary, by failing to disclose an "unwritten general rule" against lump sum payments to long-term retirees, which was found by the district court to exist and is not disputed by the majority, was misleading and therefore violated the Act.

Section 502 of the Act, 29 U.S.C. § 1132, entitled "Civil enforcement," enpowers any participant or beneficiary to enforce rights created by ERISA, whether or not a loss or denial of benefits is involved. Subsection (a)(1)(B) authorizes a suit by a participant

> "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

In addition, subsection (a)(3) permits private actions to enforce a plan's compliance with its own terms or with the requirements of the Act, authorizing suits

> "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

Subsection (c) further provides that a participant may sue an administrator for $100 per day for failing to provide "any information" he is required to furnish, except when excused by "reasons beyond the control of the administrator." 29 C.F.R. § 2520.102-3(t)(2). These compliance

suits are expressly not conditioned on a loss or denial of benefits; indeed, they may proceed even where the plaintiff is not claiming any benefits.[2] In addition, participants may also sue an administrator for violation of his fiduciary duties under §§ 401 to 414 of the Act, 29 U.S.C. §§ 1101 to 1114, without showing any denial or loss or claim of benefits.[3] These provisions effectuate Congress' clear intention that ERISA's requirements be applicable and enforceable by private suits independent of any claim for benefits, in order to provide participants with broad and expansive rights and remedies for redressing or preventing violations of the Act.[4]

The Schiavone plan summary stated that the lump sum payment option was available to all participants subject to the Committee's approval. In reality, however, under the "unwritten general rule" long-termers and retirees were ineligible for the option. This ineligibility appears

2 See, e.g., *Lechner v. National Benefit Fund for Hospital and Health Care Employees*, 512 F. Supp. 1220 (S.D.N.Y. 1981) (suit by non-claimant to prevent possible future violations); *International Ass'n of Bridge, Etc. v. Douglas*, 646 F.2d 1211 (7th Cir. 1981) (suit under 29 U.S.C. § 1132(a)(1)(B) challenging plan amendment that *might* affect unspecified future participants); *Corley v. Hecht Co.*, 530 F. Supp. 1155 (D.D.C. 1982) (misleading plan summary violates disclosure requirements of 29 U.S.C. § 1022(a)(1); *Janowski v. International Brotherhood of Teamsters Local No. 710*, 500 F. Supp. 21 (N.D. Ill. 1980) (challenging various aspects of new plan).

3 See, e.g., *International Ass'n of Bridge, etc. v. Douglas, supra; Morrisey v. Curran*, 567 F.2d 546 (2d Cir. 1977) (seeking liquidation of unsound investment); *Corley v. Hecht Co., supra* (prohibiting financial transactions between fiduciary and plan).

4 See H.R. Rep. No. 93-533, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4655; S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4838, 4871. See also *Lechner v. National Benefit Fund for Hospital and Health Care Employees, supra*, 512 F. Supp. at 1221-22 & n.6; *Kulchin v. Spear Box Co. Retirement Plan*, 451 F. Supp. 306, 311 (S.D.N.Y. 1978); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith*, 431 F. Supp. 271, 274 (E.D. Pa. 1977).

nowhere in the plan summary. The plan therefore violates § 102(b) of the Act which requires a plan summary to describe all the

> "circumstances which may result in disqualification, ineligibility, or denial of benefits . . . ." 29 U.S.C. § 1022(b).

The majority, focusing on the phrase "of benefits," suggests that the disclosure requirements does not apply to a plan's mode of payment. Such a narrow reading cannot be squared with other provisions of the Act, regulations promulgated thereunder, and Congress' intent. Section 2(b) of the Act declares that the "policy of this Act" is to require "the disclosure and reporting to participants and beneficiaries of *financial and other information* with respect to the plans," 29 U.S.C. § 1001 (emphasis added), and § 102(a)(1) of the Act requires the summary to be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). These unqualified statements of a broad disclosure requirement reflect Congress' desire to ensure "that the individual participant *knows exactly where he stands* with respect to the plan." H.R.Rep. No. 93-533, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4649 (emphasis added).

The full scope of the disclosure policy is further reflected in the regulations. Regulation § 2520.102-2(b) provides in part that

> "the summary plan description must not have the effect to [sic] misleading, misinforming or failing to inform participants and beneficiaries. [Any] excep-

tions, limitations, reductions, or restrictions of plan benefits shall be described or summarized . . . 29 C.F.R. § 2520.102-2(b). See also 29 C.F.R. § 2520.102-3(t)(1)."

The summary must "clearly identify circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits," 29 C.F.R. § 2520.102-3(1), which encompasses "claims which are denied in whole or in part." *Id.* at subsection (s). See also *id.* at subsection (t)(2); 29 C.F.R. § 2560.503-1(e)(1).

Schiavone's unwritten rule, which renders certain participants ineligible for a form of payment that is particularly valuable in times of high interest rates, surely constitutes an exception, limitation, reduction, or restriction of plan benefits which any "accurate and comprehensive" summary must include if a retiring employee is to know "exactly where he stands with respect to the plan." The plan gave the impression that the Committee would exercise discretion with respect to all retirees, including long-termers, whereas in fact it would exercise none in the case of the latter. I would hold, therefore, that Schiavone violated § 102(b) of the Act by failing to disclose in the plan summary the rule that participants with accrued benefits over $3,000 would not be eligible for the lump sum option. See, e.g., *Corley v. Hecht Co.*, 530 F. Supp. 1155, 1163-64 (D.D.C. 1982). A simple statement of the rule would have sufficed; thus the majority's objection to a lengthy enumeration of factors is misplaced. Maj. Op. p. 4, *supra.*

The Schiavone plan also violated the procedural protections provided in § 503 of the Act, 29 U.S.C. § 1133, by failing to give Pompano written notice of his denial and

an opportunity for a full and fair review.[5] The majority limits § 503 to a denial of benefits, and holds that written notice and an opportunity for review are not required for the denial of a requested mode of payment. The rationale for such a distinction escapes me, since the regulations mandate § 503's procedural safeguards whenever "a claim for a (pension, welfare) benefit is denied in whole *or in part.*" 29 C.F.R. § 2520.102-3(t)(2) (emphasis added). The denial of the requested lump sum payment, which clearly reduced the value to Pompano of his pension, certainly constitutes a partial denial of his claim. Moreover, the legislative history of § 503 reveals that Congress was concerned with procedures for resolving and reviewing "*disputes* between the plan administrator and participants or beneficiaries," H.R. Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5108 (emphasis added), which would encompass more than the outright denial of all benefits. Finally, § 503 must be interpreted in light of ERISA's strong concern with ensuring strict plan compliance with the Act. Accordingly, I would hold that Schiavone violated § 503 of the Act. See *Frary v. Shorr Paper Products, Inc.*, 494 F. Supp. 565 (N.D. Ill. 1980), where the court held that the wrongful denial of a

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5 Section 503 provides:

"In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133.

participant's request for a lump sum payment of benefits violated "his rights under the terms of the plan" (29 U.S.C. § 1132(a)(1)(B)) and ordered the lump sum payment be made.

Finally, I would also hold that Schiavone's failure to maintain written records, expressly required by the terms of the plan, is a violation of the Act that is actionable under § 502(a)(3), 29 U.S.C. § 1132(a)(3). The majority concedes implicitly that the district court erred in characterizing § 502(a)(3) as merely conferring standing by stating, in an attempt to sidestep this clear violation, that "there is no causal relationship between the conceded failure of the Committee to keep written records of their proceedings and the decision it made to deny appellant a lump sum benefit." Maj. Op. p.8, *supra*. With all due respect, this explanation, offered without any authority and devoid of any basis in the statute, is unsupportable. As noted earlier, ERISA expressly authorizes compliance suits independent of any claim for benefits, and such suits have been brought, for example, to prevent possible future violations, to challenge various aspects of a new plan, and to object to an amendment to a plan that may affect the future eligibility of unspecified participants. See note 2, *supra*. The majority's holding engrafts onto § 502 a requirement that the alleged violation of ERISA must be "causally related" to some denial of benefits. Because this can be done only by disregarding the clear terms of the Act, is legislative history and existing case law, I decline to follow that course.

In sum, I would hold that the plan summary (1) was deficient in violation of § 102(b) by reason of its failure to disclose the unwritten rule against lump sum payments to long-term retirees, (2) failed in violation of § 503 to provide a written notice of the denial of such payments

and an opportunity for review, and (3) failed in violation of § 502 to maintain written records as required by that section.

As a remedy I would award Pompano his requested lump sum payment, since such an award would further the purposes of the Act to ensure that administrators comply strictly with its provisions. See *Frary v. Shorr Paper Products, Inc., supra,* 494 F. Supp. at 471 (ordering lump sum payment as remedy). In addition, I would award attorney's fees to Pompano's counsel pursuant to 29 U.S.C. § 1132(g)(1) for his services in clarifying and enforcing rights under the Act. See *Landro v. Glendenning Motorways,* 625 F.2d 1344, 1356 (8th Cir. 1980).

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed Jul 14 1982

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of July, one thousand nine hundred and eighty-two.

RALPH POMPANO,
Plaintiff-Appellant,

-v-

MICHAEL SCHIAVONE & SONS, INC., and REVISED PENSION PLAN OF MICHAEL SCHIAVONE & SONS, INC.,
Defendants-Appellees.

No. 81-7841

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Ralph Pompano,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED, Judge Mansfield dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

/s/ Francis X. Gindhart
Francis X. Gindhart
Chief Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Filed Oct 23 '81
U.S. DISTRICT COURT, NEW HAVEN, CONN.

RALPH POMPANO :

v. : CIVIL NO. N 76-87

MICHAEL SCHIAVONE
& SONS, INC. :

MEMORANDUM OF DECISION

Plaintiff sued his former employer and the employer's pension plan[1] to compel payment of his retirement benefits in one lump sum, for damages and attorneys fees. He contends that he was entitled to the lump sum payment but that the pension plan committee, which supervises the plan, deprived him of his right to that payment in contravention of the plan provisions and the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974). There is also a claim of illegal discrimination under that Act.

Trial to the Court was held on September 23, 1980. Based on the facts found in part I of this memorandum and the conclusions of law reached in part II, Fed. R. Civ. P. 52(a), the Court renders judgment for defendants.

I.

Plaintiff Ralph Pompano worked for defendant Michael Schiavone & Sons, Inc., until January 1, 1976, when he retired. As a retired employee of the defendant company, plaintiff was entitled to certain pension payments pursuant to the provisions of the defendant Revised Pension Plan of Michael Schiavone & Sons, Inc., dated March 1, 1972.

The 1972 plan provided that employees who had worked for the defendant company for a certain period of time were eligible to receive a portion of their regular pre-retirement compensation after retirement. These pension payments could be made in any of four ways, but the standard payment was "monthly installments commencing on the date of retirement and continuing for the life of the Participant with 120 monthly payments guaranteed." Plaintiff's Exhibit 2 at 13.

There were three other modes of payment. They were available "with the prior approval of the [pension plan] committee." Plaintiff's Exhibit 2 at 7. One of the options was a single lump sum payment;[2] one was a contingent annuitant plan and the third was a straight life annuity. The plan provided that "[a]ny such optional mode of settlement shall be actuarially equivalent in value to the normal pension otherwise payable."

If an employee elected one of the three optional payment plans within one year of retirement, the pension plan committee could have required the employee to provide evidence of good health. If the employee elected one of the three optional plans, but

then changed his or her mind, the employee could withdraw the election, except that the pension plan committee had to approve the change and could require the employee to submit evidence which the committee would consider to determine if the change would have an adverse effect on the plan assets.

The committee managed the plan. It was required under Section VIII(2) to "keep accurate reports and minutes of all its proceedings and action." The committee was charged to "appoint a Secretary ... [to] keep all records of the meetings and doings of the Committee."

Section VIII(9) stated that

> [t]he action or decision of the Committee taken by it in good faith as to any matter or question arising under the Plan within the power, authority, discretion or control of the Committee shall be final, conclusive and binding upon the Company, all Employers, the Trustee, all Employees and all Participants and Beneficiaries; provided, however, that any such action or decision involving a determination as to eligibility, Normal Retirement Date or the amount of benefits (but not the mode or manner of payment of such benefits) shall, upon the written request of the person affected thereby, be subject to arbitration, in which event the Participant shall select one arbitrator, the Committee shall select a second arbitrator and the two arbitrators so selected shall select a third arbitrator. ...

Plaintiff wanted to elect the lump sum payment. Essentially, the lump sum option was a one-time cash payment equal to the value of the other options, which were payable over time. The lump sum payment was discounted to reflect the present value of the payment

which otherwise would have stretched over ten years or more.

A plan summary, Plaintiff's Exhibit 4, which was "intended to provide [employees] with an easy-to-understand explanation" of the plan provisions, described the lump sum payment option as "equal to the value of your retirement benefit." Plaintiff's Exhibit 4, Para. 15(D). The summary also said "[t]his option is available only with the permission of the Committee." *Id.*

Plaintiff intended to invest the one-time payment in an attempt to earn more income than he would receive in monthly payments. Plaintiff believed that the value of the lump sum option was $40,000, but he could not recall at trial who had told him so.

In late 1974 or early 1975, plaintiff and a "young friend" met with Michael Schiavone and Ron Sader, members of the pension plan committee.[3] Plaintiff requested the lump sum payment. Michael Schiavone told plaintiff that it was unlikely the request would be granted because it was the company's philosophy to insure stable retirement income for employees over time and because a lump sum payment to plaintiff would be against the advice of Pension Services, Inc., which provided administrative aid to the committee. No formal decision as to plaintiff's request was made at that meeting; no records of the meeting were kept.

Plaintiff has no further meetings with the plan committee. Later, the committee decided to deny plaintiff's request. Michael Schiavone also consulted his father about the request and his father concurred in the committee's decision. There were no notes from the committee meeting; no committee secretary had been appointed to keep them. Further, plaintiff was never advised in writing of the decision or the reasons for it,

although the evidence supports the conclusion that he was orally informed. There was no procedure for review of the committee's decision.

The committee made its decision sometime early in 1975. Plaintiff was scheduled to retire on April 1, 1975. At plaintiff's request, his retirement was twice postponed until January 1, 1976. Michael Schiavone testified that this extension was granted so plaintiff would leave the defendant company's employ without hard feelings, in view of the mutual antipathy that had sprung up over the committee's decision: the Court credits this testimony.

Plaintiff was not invited after his retirement to a company dinner which honored retirees and other employees because of Schiavone's fear that some unpleasant incident involving plaintiff would take place and ruin the dinner for everyone. This fear was rooted in the bitter feelings which the committee's decision occasioned and the threat by plaintiff's attorney to commence a lawsuit to compel payment of the lump sum.

Most of the testimony at trial was elicited from Richard E. Brandt, an actuary and vice-president of Pension Services, Inc., the firm which performed certain administrative functions for the defendant plan. One of those functions was to advise the pension plan committee on the actuarial soundness of the plan.

In 1972, Pension Services advised the committee not to make lump sum payments. That recommendation was based on the plan's purpose to provide continuing income for retired employees and the fact that lump sum payments had a potentially adverse affect on the plan assets in three ways. First, in order to pay lump sums, plan assets might have to be sold at a loss; second, free availability of the lump sum option would inhibit long term investment decisions and third, lump

sum payments invalidate long term mortality assumptions.

Nevertheless, some lump sum requests had been granted where the requesting employee's total benefits were not over $3,000. In this connection, at about the same time as plaintiff made his request, another lump sum request by a company executive was also denied.

Mr. Brandt testified that, as far as he knew, plaintiff could have selected any of the three other options and his selection would have been honored. Each of the other options was on the employee option election form, but not the lump sum option.

At about the time of plaintiff's retirement, the plan assets were valued at $1,252,000. Mr. Brandt testified that he did not know if there would have been any loss to the plan if plaintiff's request had been granted. Mr. Brandt also testified that the $40,000 amount plaintiff had in mind was in error; that the value of plaintiff's lump sum option was actually $38,172.

II.

Plaintiff is authorized to bring this action pursuant to 29 U.S.C. §1132(a)(1)(B) and (3)(B)(i). This Court has jurisdiction to entertain it pursuant to 29 U.S.C. §1132(e)(1).

In Section 2 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, Congress found

> that owing to the lack of employee information and adequate safeguards concerning [the operation of employee benefit plans], it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect

> to the establishment, operation, and administration of such plans. . . .

The declared policy of the Act was to protect pension plan participants

> by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. §1001(b). This Court has broad discretion in fashioning remedial and equitable relief to implement this policy. *See, e.g., Marshall v. Snyder,* 572 F.2d 894, 899, 901-02 (2d Cir. 1978).

Plaintiff claims that the evidence showed four principal violations of the Act. Defendants argue the decisions of the pension plan committee can only be challenged on a showing that the committee denied plaintiff's request in bad faith or arbitrarily, a showing defendants argue has not been made. The committee's discretionary acts should not be disturbed absent a showing of bad faith or arbitrariness, *see, e.g., Riley v. MEBA Pension Trust,* 570 F.2d 406 (2d Cir. 1977); *Vaughn v. Metal Lathers Local 46 Pension Fund,* 474 F. Supp. 613 (S.D.N.Y. 1979), *assuming* they were in accordance with law.

A.

Plaintiff argues he was illegally misled by Plaintiff's Exhibit 4, which is a summary of the 1972 Pension Plan. Specifically, he contends a statement in the summary that a lump sum payment option was an available benefit choice was inaccurate, since no lump sum

payments were ever made.[4] Failure to disclose this practice is said to violate 29 U.S.C. §1022(a)(1), which provides that plan descriptions "shall be furnished to participants" and "shall be sufficiently accurate and comprehensive to reasonably apprise ... participants ... of their rights and obligations under the plan."[5]

Plaintiff claims he was led to believe that, absent poor health, he might have received a lump sum payment. The truth, as plaintiff sees it, was that the plan was arbitrarily administered according to unwritten policies; that the pension plan committee blindly followed a flat rule laid down by Joseph Schiavone, founder of the company, that lump sums were never to be paid and that, actually, the lump sum option was not an option at all.

Consistent with the declared policy of the disclosure provisions, 29 U.S.C. §1001(b), the legislative history of Section 1022(a)(1) includes repeated references to the need for effective communication of plan contents to employees. The House Report says, "[i]t is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan [summaries]." H. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4646. There is also this: [t]he [summary] would be in such form and detail ... necessary to disclose fully and fairly all pertinent facts." *Id., reprinted in* [1974] U.S. Code Cong. & Ad. News at 4656. The Senate Report says there is a "need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan — what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures *[sic]* he must follow to obtain benefits...." S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4838, 4863.

There is little case law construing section 1022 (a)(1). *See Peckham v. Board of Trustees*, 653 F.2d 424, 428 N. 7 (10th Cir. 1981) (plaintiffs had no standing to raise issue); *Nostrame v. Consolidated Edison Co.*, 504 F. Supp. 507, 512 (S.D.N.Y. 1980) (no cause of action stated); *Trombly v. Marshall*, 502 F. Supp. 29, 32 (D.D.C. 1980) (failure to state a claim); *see also Wadsworth v. Whaland*, 562 F.2d 70, 74 (1st Cir. 1977).

In *Johnson v. Central States, Southeast and Southwest Areas Pension Fund*, 513 F.2d 1173 (10th Cir. 1975), a panel of the Tenth Circuit noted in dicta that a summary should describe the benefits *and* deficiencies of a pension plan, while ruling that the plan before the court was not "positively deceptive." *Id.* at 1176 (district court decision was clearly erroneous).

The word "accurate" as used in Section 1022(a)(1) incorporates many concepts, but principally one of *clarity*. Understood this way, is the 1972 plan summary "accurate?" In this Court's opinion, it is.

It is quite plain from the evidence that the lump sum option *was* only available with the pension committee's consent, and that consent was rarely given. It is also clear that the committee did not blindly follow an arbitrary path, but instead adhered to a rational rule based on the advice of the plan servicing organization and an internal company policy. In cases where payment of lump sums were made, the general rule did not apply because of the small amount involved. The lump sum option was an option, but only under limited circumstances.

Although plaintiff makes much of the fact that the general rule was an unwritten one, this Court finds that the language of the plan and the summary imported reasonable discretion on the part of the trustees, and that the rule applied by the committee was an exercise of that discretion. Evidence of good health was an

additional prerequisite if option selection was made "within the one-year period preceding the Option Effective Date" or if an option election was cancelled "less than one year prior to the Option Effective Date." *See* Plaintiff's Exhibit 2 at 7.

Plaintiff argues that since the lump sum option was actuarially equivalent to the other three options, it made no difference which plaintiff elected. And since plaintiff's request for any of the three other options would have been granted, he argues this proves the lump sum option was an "illusion." This contention misses the point of Mr. Brandt's testimony: payment of large lump sums would have disturbed certain long term assumptions built into administration of the plan assets. Morever, lump sum payments would have limited long term investment planning.

Defendants were entitled to rely on Pension Services' recommendation regarding the actuarial soundness of the plan and lump sum payments. Similarly, the company policy to insure stable retirement pay was an appropriate consideration. At all events, defendants did not violate Section 1022(a)(1) of the Act; plaintiff was "reasonably apprise[d] ... of [his] rights and obligations under the plan."

B.

Plaintiff also argues the evidence proved a violation of Section 1133(1) and Section 1133(2). The former requires written notice to a plan participant when a benefit claim is denied; the latter requires plans to afford an opportunity for review of such a denial. Defendants argue that Sections 1133(1) and (2), like the whole of ERISA, are protections against Forfeiture of benefits and do not concern the mode of payment.

Neither party has cited to any case where a similar claim has been raised. Plaintiff cites *Baeten v. Van Ess*,

474 F. Supp. 1324 (E.D. Wis. 1979) for the proposition that fundamental fairness is implicit in Section 1132 of the Act as well as explicit in Section 1133. He argues that he was afforded no procedural fairness at all.

Baeten is substantially different from the instant case. Plaintiffs in *Baeten* lost their retirement benefits after a decision which the district court characterized as arbitrary because it had been made in a factual vacuum. 474 F. Supp. at 1327.

The evidence at trial in this case established that two meetings were held regarding plaintiff's request. At the first, Michael Schiavone and Ron Sader discussed the request with plaintiff and his friend, telling them the request was not "feasible." At a later meeting of the committee, the request was denied. No written notice of the committee action was sent, but plaintiff was notified of the denial.

Under the '72 plan, there was no provision for review of a committee decision denying a particular option election. There was a provision for submission of a decision of forfeiture to arbitration. *See* Plaintiff's Exhibit 2, §VII(2)(b). There was also a provision for arbitration regarding committee decisions on eligibility, normal retirement date and the amount of benefits, but that provision specifically excepted arbitration of committee decisions about the mode or manner of benefit payments. *See* Plaintiff's Exhibit 2, §VIII(9).

The legislative history of Section 1133 is brief. The House bill did not include Section 1133. The Senate bill provided for arbitration of disputes between plan administrators and beneficiaries. As enacted, Section 1133 was the result of compromise in a joint conference committee. According to the committee report,

> [u]nder the conference agreement every employee benefit plan is required to provide adequate

> notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for denial written in a manner calculated to be understood by the participant. In addition, the plan administrator is required to afford a reasonable opportunity to any participant or beneficiary whose claim for benefits has been denied for a full and fair review of this decision by the plan administrator.

House Conf. Rep. No. 93-1280, Joint Explanatory Statement of the Committee of Conference, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5108.

The Court is persuaded by defendants' argument that the language of Section 1133, which refers to a plan participant "whose claim for benefits ... has been denied," does not cover plaintiff, whose claim for benefits was honored, but not in the form he preferred. A reading of the Act as a whole supports this conclusion. For example, the Pension Benefit Guaranty Corporation was established to insure payment of benefits. *See* 29 U.S.C. § 1302(a). Minimum Funding standards were enacted to insure an adequate base for payment of benefits. *See* 29 U.S.C. §§1082-1085. Employers are required to furnish requesting participants with information on "total benefits accrued." *See* 29 U.S.C. §1025(a)(1). Nowhere in the Act did Congress narrow its focus to the *form* of benefit payments; instead, it concentrated on safeguards for plan participants in relationship to benefits as a whole. *See also* H. Rep. No. 93-533, 93d Cong. 2d Sess. Section 111(c), *reprinted in* [1974] U.S. Code, Cong. & Ad. News 4639, 4644; 29 C.F.R. §2560.503-1 (1980). For these same reasons, Section 1133(2) relating to appeal from a denial of benefits does not apply.[6]

Even assuming Section 1133 did apply to the plan committee's decision not to give plaintiff the requested lump sum, the Court is unable to say a failure to provide written notice would *ipso facto* entitle plaintiff to an equitable decree directing payment. At most, damages might be appropriate, *but cf. Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979) (punitive damages not recoverable under the Act), but none were proved. An injunction directing compliance might have been in order had there been any proof of a continuing course of conduct. Plaintiff is entitled to no relief on this claim.

C.

Plaintiff's third claim is that defendants failed to perform certain recordkeeping duties. Section VIII of the '72 plan provided a "blueprint" for committee action. *Inter alia*, Section VIII dealt with committee membership, compensation and duties. Part of Subsection 2 read: "[t]he Committee shall keep accurate reports and minutes of all its proceedings and action." Subsection 4 required the committee to "appoint a Secretary who . . . shall keep all records of the meetings and doings of the Committee." There was also a provision in subsection 6 which allowed committee action to be taken in writing rather than at a meeting.

At trial, Michael Schiavone admitted that the committee had no secretary, that he had never kept minutes of meetings, that there were no records or notes from any meetings with plaintiff and that he did not know who was responsible for keeping records.

Plaintiff argues that Schiavone's testimony proves a violation of Sections 1059(a)(1) and 1132(a)(1)(B). Plainly, the evidence does not support a violation of Section 1059(a)(1), which requires employers to keep records "sufficient to determine the benefits due . . . employees."

As to Section 1132(a)(1)(B), plaintiff contends that the language, "[a] civil action may be brought by a participant ... to enforce his rights under the terms of the plan," makes breach of a plan provision a violation of federal law. That extraordinary reading of Section 1132(a)(1)(B) is unsupported by any authority and, in the opinion of this Court, is unsound.

No doubt Congress intended that individual participants should be able to sue to protect their retirement benefits. This is clear, since in Section 1132(a)(3), individual participants are authorized to bring actions almost as though they were private attorneys general. Under Section 1132(a)(3), plaintiff might arguably have obtained an injunction requiring defendants to keep records if there had been any evidence of a present violation. Nothing in Section 1132(a)(1)(B), which by its plain language only grants standing to sue, suggests however, that violation of a plan provision such as those admitted here should be considered a violation of federal law.

D.

Plaintiff's final argument is that defendants unlawfully discriminated against plaintiff within the meaning of Section 1140 of the Act when they did not invite him to an annual company dinner. Defendants contend that Section 1140 does not reach plaintiff's claim.

Michael Schiavone testified that the company dinner was for all employees and that it was not company practice to have individual retirement dinners. Retirees were honored at the company dinner, but years of service awards were also given. The Court credits Mr. Schiavone's testimony that plaintiff was not invited to the dinner because of the mutual antipathy that had sprung up after the lump sum request was denied. Mr. Schiavone testified that harsh words had been exchanged and that it was evident a law suit would be

filed; he said that under these circumstances, plaintiff was not invited for fear that some incident which would spoil the dinner for others would occur.

It is relevant to the discrimination claim that defendants twice postponed plaintiff's retirement date at plaintiff's request so that he would "feel better about the company." Although plaintiff would ordinarily have been terminated after his sixty-fifth birthday in April, he worked until January 1 of the following year.

In *West v. Butler*, 621 F.2d 240 (6th Cir. 1980), a panel of the Sixth Circuit Court of Appeals looked into the legislative history of the non-interference provisions of the Act, Sections 1140 and 1141. The question in *West* was whether appellants had a private right of action under Section 1141; to reach the conclusion that they did not, the court analyzed the relationship between the two sections. *Id.* at 243-45.

The court read Section 1140 as a protection against "unscrupulous employers" who discharged or harassed employees to keep them from obtaining vested pension rights. *Id.* at 245. The court concluded "Congress designed [Section 1140] primarily to protect the employment relationship that gives rise to an individual's pension rights" and held that to violate Section 1140, the individual's employment relationship must be affected in some substantial way.[7] *Id.* at 245-46. *Cf. Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979) (allegation of discharge to prevent attainment of vested rights stated a cause of action under Section 1140).

In this Court's view, plaintiff failed to prove defendants' failure to invite plaintiff to a social function which was not exclusively for him or retirees in general was discrimination caused by plaintiff's lump sum benefit request. Although plaintiff's request and defendants' failure to invite plaintiff to the company

dinner were incidents in the same series of events, the failure to invite plaintiff to the dinner was not proved to be "*for* exercising [a] right" under the '72 plan; put another way, the alleged "discrimination" was not caused by plaintiff's request for a lump sum payment. Instead, the evidence showed that, despite the hard feelings engendered by the dispute, defendants treated plaintiff favorably by granting him two extensions of his retirement date. The evidence established that the sole reason plaintiff was not invited to the company dinner was concern for others at the dinner. There was no illegal discrimination.

III.

The Clerk is directed to enter judgment for the defendants; plaintiff to take nothing on his complaint. Each party shall bear its own costs. Fed. R. Civ. P. 54(d).

SO ORDERED,

/s/ Ellen Bree Burns
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated: October 23, 1981.

NOTES

[1]*See* 29 U.S.C. §1132(d)(1).

[2]The lump sum option was dropped when the defendant plan was revised in 1976.

[3]Michael Schiavone identified plaintiff's "young friend" in the spectators gallery during trial. He was not identified by name nor did he testify. The only other reference to this "friend" in the record may be in plaintiff's option election form, Defendants' Exhibit C, wherein "Robert T. Irwin — (Friend)" is made plaintiff's beneficiary.

[4]The challenged section of Plaintiff's Exhibit 4 is this:

15. Are There Any Optional Forms of Payment Under The Plan?

While your benefits are calculated on the basic option, you may select either methods *[sic]* of payment. The amount of payment will vary according to the plan you select, but it will be the actuarial equivalent of the basic option. Various choices are outlined below:

D. *Lump Sum*

Under this option, you receive a lump sum equal to the value of your retirement benefit. This option is available only with the permission of the Committee.

[5]The Secretary of Labor has promulgated regulations relating to plan descriptions. 29 C.F.R. §2520.102-1 to .102.4. The regulations were of course issued after this action was filed, but the plan summary nonetheless meets the requirements of the regulations.

[6]Assuming *arguendo* that Section 1133(b) applies to plaintiff's claim, the exemption in Section VIII(9) of the 1972 plan regarding review of decisions as to form of payment would presumably be void. That would raise the question whether plaintiff was obligated to arbitrate his claim to exhaust his interfund remedies. *See, e.g., Amato v. Bernard,* 618 F.2d 559 (9th Cir. 1980).

[7]The *West* court noted the parallel between Section 1140 and Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3). 621 F.2d at 245. To establish an unfair labor practice under Section 8(a)(3), the complainant must show that the employer harbored an unlawful intent. *B.G. Costich & Sons, Inc. v. N.L.R.B.,* 613 F.2d 450, 454 (2d cir. 1980). Insofar as the language of Section 1140 parallels Section 8(a)(3) and includes an intent element, 621 F.2d at 245 (citing remarks of Senator Hartke), there was no evidence at trial to establish such an intent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Filed Oct 23 '81

RALPH POMPANO

vs.

MICHAEL SCHIAVONE & SONS, INC. and REVISED PENSION PLAN OF MICHAEL SCHIAVONE & SONS, INC.

JUDGMENT

CIVIL ACTION
FILE NO. N-76-87

This action came on for trial before the Court, Honorable ELLEN BREE BURNS, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, together with the Court's Findings of Fact and Conclusions of Law, filed on October 23, 1981,

It is Ordered and Adjudged that judgment be and is hereby entered in favor of the defendants dismissing this action and the plaintiff to take nothing on his complaint.

Dated at New Haven, Connecticut, this 23rd day of October, 1981.

SYLVESTER A. MARKOWSKI
Clerk of Court

BY /s/
DEPUTY IN CHARGE

§1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024 (b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions

providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

Pub.L. 93-406, Title I, §102, Sept. 2, 1974, 88 Stat. 841.

§1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

§1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall —

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

Pub.L. 93-406, Title I, §503, Sept. 2, 1974, 88 Stat. 893.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,

In The
Supreme Court Of The United States

OCTOBER TERM, 1982

NO. 82-641

RALPH POMPANO,
Petitioner

v.

MICHAEL SCHIAVONE & SONS, INC., and
REVISED PENSION PLAN OF
MICHAEL SCHIAVONE & SONS, INC.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF THE CASE

Ralph Pompano, a retired employee of Michael Schiavone & Sons, Inc. ("Schiavone"), brought this action under the Employee Retirement Income Security Act of 1974 ("ERISA") against Schiavone and the Revised Pension Plan of Michael Schiavone & Sons, Inc. of 1972 ("Plan"), in an effort to require the Pension Committee to award him a lump sum payment in lieu of the normal monthly retirement benefit provided by the Plan. Each month since his retirement, Mr. Pompano has received a monthly pension payment in the amount of $296.83, which is the actuarial equivalent of the lump sum pension payment he sought. (App. p. 3A).*

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*Parenthetical references are to the Appendix to the Petition.

The standard method of payment under the Plan was a monthly retirement payment continuing for the life of the participant. (App. p. 21A). Three alternative methods of payment, one of which was the lump sum option, also were provided for in the Plan. As the plan summary explicitly stated, these alternative modes of payment were available "only with the permission of the Committee." (App. p. 3A).

In the exercise of the discretion given it under the Plan, the Pension Committee denied Mr. Pompano's request for a lump sum payment. This decision was based in large part on advice given the Pension Committee by Pension Services, Inc., the Plan's pension consultant, which had advised against making large lump sum payments for three principal reasons: first, Plan assets might have to be sold in order to make

large lump sum payments; second, free availability of the lump sum option would complicate long-term investment strategy by forcing the Plan to retain funds in more liquid assets; and third, such payments would tend to invalidate long term overall mortality assumptions because a self-selected group of participants with a shorter life expectancy would elect the lump sum option. (App. pp. 6A, 24A). Furthermore, as the Court of Appeals noted, approval of the lump sum request made by Mr. Pompano would have been inconsistent with Schiavone's philosophy of providing a continuing source of income to its retiring employees. (App. p. 6A).

The decision made by the Pension Committee in the present case was consistent with the treatment given to other retiring employees. The evidence

showed that large lump sum payments had been refused to Schiavone executives, and that the Pension Committee had only granted lump sum requests where the payments were less than $3,000.(App. p. 25A).* On such occasions the Pension Committee had concluded that such modest payments did not constitute a drain on the Plan's assets and would not have met the Plan's primary purpose of providing participants with a monthly income sufficient for retirement. (App. 6A).

There is no claim that the petitioner has been denied his pension benefits under the Plan, nor is there any claim that petitioner was treated differently than any similarly situated

---

*Petitioner's lump sum payment would have been $38,172. (App. 6A).

Plan participant. This controversy concerns only the petitioner's desire to obtain a lump sum payment instead of the normal monthly retirement benefit.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS BELOW NEITHER CONFLICT WITH DECISIONS OF THIS COURT NOR CREATE A CONFLICT AMONG THE CIRCUITS

It is axiomatic that a petition for certiorari will not be granted merely on a showing that the decision of the court below was incorrect:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitfoner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgmts.' . . . If we took every case in which

> an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court.
>
> Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi, reprinted in Stern and Gressman, Supreme Court Practice, at pp. 258-59 (5th ed. 1978).

In the same vein, Chief Justice Taft observed:

> The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.
>
> Magnum Co. v. Coty, 262 U.S. 159, 163 (1923).

See also Dick v. New York Life Insurance Company, 359 U.S. 437, 452-55 (1959) (Frankfurter, J., dissenting). These sentiments have now been codified in Rule 17 of the Supreme Court Rules, which stipulates that a review on writ

of certiorari "is not a matter of right," and will be granted "only where there are special and important reasons therefor."

In addition to re-arguing the merits, the present petitioner has urged two reasons for granting the writ. He claims that the decisions below are inconsistent with decisions of this Court, and he asserts that the decisions below create a conflict among the circuit courts as to ERISA's interpretation. Neither of these claims is supported by the cases cited in the petition.

I

Where a petition for certiorari is sought on the ground of conflict between the circuits or between the lower court opinion and an opinion of the Supreme Court, the petitioner must demonstrate that there is a "real conflict on the

same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Stern and Gressman, Supreme Court Practice, op cit. at 264. Where the alleged conflict is not a true conflict on precisely the same question, the petition for certiorari is "but one way of saying that the decision below is wrong in light of general principles." Id. at 265. This is not a sufficient reason for granting the writ. Indeed, the Court will dismiss a writ of certiorari as improvidently granted where subsequent examination reveals that the alleged conflict did not in fact exist. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 392-93 (1923); Keller v. Adams-Campbell Co., 264 U.S. 314, 319-20 (1924); Wisconsin Electric Co. v. Dunmore

Co., 282 U.S. 813, 813 (1931); Sanchez v. Borras, 283 U.S. 798, 799 (1931).

Even a cursory review of the cases cited by the petitioner in support of his argument that the decisions of the courts below are in conflict with decisions of this Court demonstrate the absence of any conflict. Not only are the cases cited at page 6 of the petition not directly in conflict with the decisions below, they do not even involve the same statute. Three of the Supreme Court cases cited concern the securities laws, while the fourth is a case under the Truth-in-Lending Act.

To warrant the issuance of a writ of certiorari, the claimed conflict must be a direct one:

> Lawyers, of course, are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine; that is what

> makes the ruling below "erroneous." But such a loose reading of the [Rule 17] concept of a decision "in conflict with applicable decisions of this court" does not satisfy the Supreme Court's understanding of what constitutes a conflict, and will not be sufficient to obtain a grant of certiorari. A true conflict, in other words, must be direct and irreconcilable, and must be demonstrably so.
>
> Stern and Gresser, op cit. at p. 273. (emphasis supplied).

This requirement of a direct conflict has become even more stringent under the present Supreme Court Rules. While the former Rule 38(5)(b) required only a showing that the decision of the Court of Appeals was "probably" in conflict with a Supreme Court opinion, the present Rule 17.1(c) has eliminated the word "probably." It is evident from the cases cited in his petition that petitioner has failed to meet this exacting standard.

II

Petitioner asserts that the opinions below also create a conflict among the circuits as to the scope of 29 U.S.C. § 1132(a). In support of this claimed conflict, petitioner cites, at page 10 of his petition, several cases which hold that ERISA permits pension plan participants to bring suit to enjoin present and threatened future violations of a pension plan.

The decision of the courts below in the present case are entirely consistent with this position. Thus, the Court of Appeals agreed that § 1132(a) authorized pension plan participants to institute suit under ERISA to enforce the provisions of the pension plan, and the trial court noted that petitioner might have obtained an injunction if there were evidence that the Plan violation alleged -- failure to keep minutes of

Pension Committee meetings -- was a continuing one. (App. pp. 9A, 10A, 33A).

However, the failure to keep minutes was not deemed sufficient to grant petitioner the relief he sought, because it was not causally related to the Pension Committee's decision to deny petitioner a lump sum form of payment. (App. pp. 9A-10A).

The present petitioner never sought an injunction directing the Pension Committee to keep minutes. Rather, he attempted to use the failure to keep minutes as a justification for requiring the Pension Committee to reverse its decision on the lump sum payment. None of the cases cited at page 10 of the petition holds or even suggests that a procedural irregularity, such as the failure to keep minutes of pension committee meetings, would justify a court order directing a particular

method of payment of a pension, where the pension committee's decision as to the method of payment was not in any way affected by the procedural irregularity.

Accordingly, the petitioner has failed to demonstrate any conflict, either among the circuits or between the opinion below and the decisions of this Court.

II. THE PETITION DOES NOT PRESENT ISSUES OF NATIONAL IMPORTANCE

Even if there were a "true" conflict in the present case, that does not guarantee that the Court will issue the writ:

> The Court as a whole now seems committed to giving the existence of a conflict less than decisive weight.
>
> * * *
>
> The important and recurring nature of the issue in conflict often plays a decisive role in the grant or denial of certiorari.

Stern and Gressman, op cit. at 269-70.

Thus, Chief Justice Vinson admonished:

> To remain effective the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.
>
> Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi, reprinted in Stern and Gressman, op cit. at 259. (emphasis supplied).

Petitioner has not even attempted to argue that the issues raised in the present case meet Chief Justice Vinson's test. In assessing the national significance of the present petition, it must be emphasized that this case is not concerned with a denial of pension benefits. The petitioner is concededly receiving a monthly retirement income, which is the actuarial equivalent of the

lump sum payment he would prefer. All that is involved is a dispute over the manner of payment of those benefits, and the courts below held that the Pension Committee did not abuse its discretion in refusing to deviate from the standard monthly payments. (App., pp. 7A, 28A).

That the manner of payment of pension benefits is not a matter of importance beyond the present parties is evidenced by the fact that, as the Court of Appeals pointed out, ERISA contains no provisions whatsoever dealing with the form and manner of payment of pension benefits. (App. p. 9A). That issue is left to the discretion of the pension plan's fiduciaries.

The thrust of the Act, as evidenced by its legislative history, is to prevent the unwitting forfeiture of pension benefits:

> Descriptions of plans furnished to employees should be presented in a manner that an average and reasonable worker participant can understand intelligently. It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets.
>
> H.R. Rep. No. 93-533, 93d Cong. 1st Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 4646.

Accordingly, in setting forth the requirements of a plan summary, 29 U.S.C. § 1022(b) mandates only that the summary disclose the circumstances which may result in a "denial or loss of benefits." Similarly, 29 U.S.C. § 1133 requires written notice and an opportunity for review only where a "claim for benefits has been denied."

In short, the central focus of ERISA is to protect employees from engaging in actions which would cause a forfeiture

of benefits under the pension plan. Nothing in the language or purpose of the Act suggests that Congress had any concern over the particular manner of payment. This case, being limited to a dispute over the manner of payment, is therefore not one which will have "immediate importance far beyond the particular facts and parties' involved."

III. THE DECISIONS BELOW ARE CONSISTENT WITH THE LANGUAGE AND SPIRIT OF ERISA

Plaintiff raises three issues in his petition for certiorari. He argues first that the plan summary should have specified that the lump sum mode of payment would be granted only in instances where the total pension benefit was small. Second, he contends that he should have received written notice of the reasons for the Committee's decision not to grant a lump sum payment, as well as an opportunity

for review of that decision. Third, he asserts that the courts below erred in not awarding him judgment because of the defendants' failure to keep written records of its meetings. None of these arguments can withstand scrutiny.

I

The short answer to the claim that the plan summary should have informed plan participants that the lump sum payment was not available to long term employees is that that information is not required by the terms of the statute. The statute requires that the plan summary disclose the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," 29 U.S.C. § 1022(b)(emphasis added). ERISA does not require disclosure of detailed information concerning the manner of payment of pension benefits.

Furthermore, the record is clear that petitioner was not misled by the plan summary. The plan summary, in unambiguous language, informed participants, including petitioner, that the lump sum option was not available as a matter of right, but only in the Pension Committee's discretion:

> D. Lump Sum
>
> Under this option, you receive a lump sum equal to the value of your retirement benefit. This option is available only with the permission of the Committee.
>
> (App. p. 36A)
> (emphasis supplied).

Thus, even if ERISA's summary plan description requirements encompassed the mode of payment -- and they do not -- the present description was sufficient on its face. Indeed, the trial judge made a specific finding that petitioner was not misled by the plan summary, and

this finding was affirmed by the Court of Appeals. (App. pp. 29A, 7A-8A).

Finally, as the Court of Appeals observed, requiring the Pension Committee to enumerate in the summary all the factors to be considered by the Pension Committee in making its determination as to lump sum payments would defeat the very purpose of the summary -- i.e., a brief synopsis of the plan -- and would undercut the flexibility essential to effective financial management which Congress intended to vest in pension plan fiduciaries. (App. pp. 5A, 6A).

II

As to the claim that the petitioner did not receive written notice of the Committee's decision regarding the lump sum or an opportunity for a review of that decision, the very language of the statute itself makes it apparent that

written notice and an opportunity for review are required only where a "claim for benefits" has been denied. Thus 29 U.S.C. § 1133 provides that the plan shall:

> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.
>
> (emphasis supplied).

There has been no denial of a "claim for benefits" in the present case; indeed the plaintiff has received, and continues to receive, retirement benefits each month since his retirement. The only dispute is over the particular method of payment.

The legislative history of § 1133 confirm that ERISA's procedural safeguards were intended to come into play only where there has been a denial of a "claim for benefits." That section was included as a compromise between the House Bill, which contained no procedures for resolving disputes between the plan administrator and participants, and the Senate version, which provided for review and arbitration of all disputes. The final compromise version imposed the procedural requirements only where there has been a denial of a "claim for benefits." H.R. Rep. No. 93-1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 5038, 5108.

The petitioner has failed to cite a single case or statutory section which supports his contention that the Committee's discretionary refusal to

grant a lump sum payment was a "denial of benefits" which would trigger the procedural requirements of §1133.

III

The petitioner's final claim is that the Pension Committee violated the Plan's requirements by failing to keep minutes of its meetings. It is important to note that these requirements are not mandated by federal law, but are merely provisions in the Plan itself. ERISA permits a plan participant to bring an action to enforce the provisions of the Plan. 29 U.S.C. § 1132(a)(3). Therefore, it is possible that a participant in the Plan sub judice may have had a right of action to seek an injunction requiring that the Pension Committee keep minutes. Thus, the District Court noted that petitioner might have arguably obtained an injunction if there were any

evidence of a present violation, but there was no evidence of any present violation. (App. p. 33A).

The only appropriate relief for the failure to keep minutes would be an order requiring that that be done. However, petitioner has never requested such relief. Instead, petitioner attempts to use the failure to keep minutes as a justification for overturning the Pension Committee's decision to deny a lump sum benefit. The fundamental flaw in this attempt is that the petitioner has not been damaged by the failure to keep minutes. The only possible value of written minutes is to provide petitioner with a summary of the Pension Committee's actions. In numerous oral communications between Mr. Pompano and the Pension Committee members, Mr. Pompano was fully informed of the Committee's decision on his

request for a lump sum payment and the reasons therefor. (App. p. 10A). Consequently, there can be no dispute that Mr. Pompano did not suffer any prejudice as a result of the failure to keep written minutes.

Finally, the most telling refutation of petitioner's contention that the failure to keep minutes can be used to secure for petitioner that which he could not have obtained if minutes had been kept, i.e., a lump sum retirement payment in contravention of the Pension Committee's decision, is petitioner's inability to cite a single case in support of this argument.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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